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BARBARA GRUTTER,

Petitioner,

v.

LEE BOLLINGER, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF THE HARVARD BLACK LAW STUDENTS ASSOCIATION, STANFORD BLACK LAW STUDENTS ASSOCIATION AND YALE BLACK LAW STUDENTS ASSOCIATION AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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INTEREST OF *AMICI CURIAE*

The Black Law Students Associations of Harvard Law School ("Harvard"), Stanford Law School ("Stanford") and Yale Law School ("Yale") (collectively, "the BLSAs") submit this brief as *amici curiae* in support of Respondents, urging this Court to affirm the Sixth Circuit's ruling that the University of Michigan Law School ("Michigan") has a compelling interest in promoting racial diversity in its student body, and that Michigan's admissions policy is narrowly tailored to serve that interest.[1] The BLSAs are chapters of the National Black Law Students Association, a nonprofit student organization with over 200 chapters and 6,000 members that is dedicated to promoting the academic and professional goals of black law students.[2] The BLSAs' members hail from many different ideological, political, religious, national, ethnic and socio-economic backgrounds. Major activities of the BLSAs include projects relating to law school admissions, alumni affairs, professional recruitment, community service and academic support, often in partnership with other student organizations and their respective law school administrations. The alumni of the BLSAs rank among the most distinguished graduates of their institutions, and are currently serving

[1] Pursuant to Supreme Court Rule 37, this brief is filed with the written consent of all parties. The parties' consent letters are on file with the Court. This brief has not been authored, either in whole or in part, by counsel for any party, and no person or entity, other than the *amici curiae*, their members or their counsel has made a monetary contribution to the preparation or submission of this brief.

[2] The views of *amici curiae*, as expressed in this brief or otherwise, do not represent the official views of Harvard Law School, Stanford Law School, Yale Law School or the National Black Law Students Association.

as respected litigators, judges, law professors, legislative officials and principals of major corporations and non-profit organizations. These graduates have been pioneers in integrating the legal profession, and have helped the bar and the bench become more responsive to the needs of a society that is rapidly growing more diverse.

The current membership of the BLSAs includes students who are beneficiaries of law school policies that take race into account as one factor among many in admissions decisions. Like all of their classmates, the students who make up the BLSAs have received a broader, more intellectually stimulating education because they have had the opportunity to study and socialize in academic environments that are enriched by racial diversity. The BLSAs have an interest in this case because they are committed to maintaining racial diversity in legal education and in the legal profession.

SUMMARY OF ARGUMENT

Racial diversity in a student body improves the quality of legal education. Such diversity is especially critical for "elite" law schools, such as Harvard, Michigan, Stanford and Yale.[3] These law schools share a

[3] For the purposes of this brief, the term "elite law school" refers generally to the nation's most selective public and private law schools. These institutions typically admit less than 20 percent of all applicants, and are often listed as approximately the top 20 schools in various law school rankings. *See, e.g.*, Best Graduate Schools, *U.S. News & World Report*, Apr. 15, 2002, at 64; Brian Leiter, *The Top 40 Law Schools, in*

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broadly defined public mission to train graduates for leadership and service, and to instill within them zeal to confront enduring dilemmas in American law and society. Recent social science studies have documented in detail how diversity broadens the scope of campus discourse and teaches lessons in tolerance and cooperation. Diversity also helps shatter lingering stereotypes regarding supposed ideological uniformity within racial groups. As current students at elite law schools, the BLSAs' members are uniquely positioned to explain some of the significant educational advantages attributable to the racially inclusive environments found at their institutions. These students have participated in and learned from campus discourse and debates that are not likely to occur in racially homogenous academic settings.

Racial diversity is similarly vital to the credibility and legitimacy of the legal profession. Although full integration of the profession remains a distant goal, elite law schools have been uniquely instrumental in preparing minority[4] students – and especially black students – for leadership positions in the bar and on the bench. Without the ability to consider race in admissions decisions, these schools will fall short of fulfilling their unique public missions.

Race-neutral alternatives are not effective substitutes for race-conscious admissions policies. If elite law schools

New Educational Quality Rankings of U.S. Law Schools (2002), *at* http://www.utexas.edu/law/faculty/bleiter/rankings/peer_groups.html.

[4] The term "minority," as used in this brief, refers primarily to blacks, Latinos and Native Americans, the historically disadvantaged groups who are the principal beneficiaries of admissions policies that take race into account.

are not allowed to consider race as one factor in admissions, the representation of black students at elite law schools will drastically diminish. Moreover, as demonstrated in California and Texas, and as shown in empirical studies, the alternative programs that have been touted as promising replacements for race-conscious admissions policies do not produce the racial diversity that is necessary for elite law schools to train future American leaders.

ARGUMENT

I. RACIAL DIVERSITY IS NECESSARY FOR ELITE LAW SCHOOLS TO FULFILL THEIR PUBLIC MISSION OF TRAINING STUDENTS FOR LEADERSHIP POSITIONS AND INTEGRATING THE LEGAL PROFESSION

This Court's equal protection jurisprudence, from *Regents of University of California v. Bakke*, 438 U.S. 265 (1978), through *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), makes clear that the use of racial classifications must serve a "compelling governmental interest," and that race-conscious policies used to achieve this end will pass muster under the strict scrutiny standard only if they are "narrowly tailored." *Adarand*, 515 U.S. at 202. The BLSAs emphasize the compelling interest of Michigan (and the nation) in the educational benefits of law school admissions policies that take race into account. As law students at Harvard, Stanford and Yale, the current members of the BLSAs have a unique perspective on these benefits, for they have witnessed first-hand the positive effects of a racially diverse student body.

Since the late 1960s and early 1970s, most elite law schools – Harvard, Stanford and Yale in particular – have demonstrated a robust commitment to ensuring that their student bodies are racially diverse.[5] The mission of these elite law schools is to train students not simply to become practicing attorneys, but more broadly to tackle persistent social problems, to advocate reform of the justice systems in the United States and abroad, to expand the intellectual frontiers of legal scholarship and to protect the rights and liberties of the nation's most defenseless individuals.[6] In

[5] *See* David B. Wilkins et al., *Harvard Law School Report on the State of Black Alumni 1869-2000* 34-35 (2002) (hereinafter *Harvard Black Alumni Report*) ("In 1965 Harvard Law School developed the first program specifically designed to encourage black students to attend historically white law schools. In the succeeding decades, the Law School has produced more black lawyers than virtually any law school other than Howard University."); William G. Bowen & Derek Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* 5 (1998) (noting that the admissions policy Harvard used to increase its number of black law students "was adopted by other law schools, and black enrollment began to rise"); *cf.* Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admissions Decisions*, 72 N.Y.U. L. Rev. 1 (1997) (finding that a "numbers-only" approach to admissions would result in dramatic declines in rates of minority admissions to law schools, and especially to elite law schools).

[6] *See, e.g.*, Harvard Law School, *Harvard Law School Catalog 2002-2003* 24 (2002) (stating that Harvard Law School seeks to train its students to provide "solutions to many of the world's complex legal and social challenges."); Stanford Law School, *Stanford Law School Student Handbook 2002-2003* 1 (2002) (hereinafter *Stanford Handbook*) (stating that Stanford seeks to graduate lawyers "who contribute actively to solving the problems that confront individuals, the nation, and the world * * * and who * * * will assume positions of leadership in the profession and in public and private institutions"); Yale Law School, *Bulletin of Yale Law School* 19 (2002) (Yale takes a "broad view of the role of law and lawyers in society" and seeks to "advance inquiry at the

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other words, these institutions have staked out a bold public mission, and have defined one of their goals as providing visionary leadership for the legal profession and the nation. Moreover, these law schools have been remarkably successful in catapulting their graduates into prominent positions in private practice, public service, business and academia. As the nation becomes increasingly diverse, these schools will be unable to realize their public missions without a student body that resembles the larger multiracial society they seek to serve.

A. Racial Diversity in Legal Education Prepares Students at Elite Law Schools To Meet the Challenges of Our Multiracial Democracy

1. Racial Diversity Enhances the Quality of Legal Education by Improving Academic Interactions

Over half a century ago, in a decision that struck down racial exclusion in admissions policies at the University of Texas Law School ("Texas"), this Court recognized that

> although the law is a highly learned profession, * * * it is an intensely practical one. The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned.

Sweatt v. Painter, 339 U.S. 629, 634 (1950). The differences between the Texas admissions policy in 1950, which this Court considered in *Sweatt*, and the admissions policies at Michigan before the Court today are fundamental and dispositive. Texas sought to deny the petitioner in *Sweatt*, as well as each of the white law students it admitted, any opportunity to study law in an environment that promoted mutual respect and learning across racial lines. In contrast, the purpose of Michigan's admissions policies (and the similar policies at many other elite law schools) is to enhance the educational experience of all students by enrolling sufficient numbers of minority students to facilitate the sorts of interracial interactions that help produce lawyers capable of leadership in a multiracial society. Before the 1950s, this Court and our profession played a shameful role in maintaining a segregated America. Nothing in the Constitution requires a return to that era, and nothing in the Constitution prohibits Michigan's effort to fulfill its public mission by training lawyers in a racially diverse academic environment.

Today, virtually all law schools have recognized that enrolling significant numbers of minority students improves the quality of legal education. Although the advantages of racially integrated academic settings have often been praised in qualitative, abstract terms, recent social science studies have provided empirical confirmation that

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boundaries of the law."). Michigan shares this public mission. *See* University of Michigan Law School, *Michigan Today*, *at* http://www.law.umich.edu/prospective students/Admissions/today.htm ("In addition to rigorous professional training, the Law School provides students with the opportunity for reflection about many of our most fundamental and urgent public questions.").

racial diversity on campus does in fact produce tangible educational benefits. Racial diversity fosters an intellectually challenging environment and encourages discussions that are attuned to contemporary legal, social and political issues. Such diversity also instills in students core democratic values such as cooperation, tolerance and affinity for reasoned deliberation.

For example, a recent survey of law students at Harvard and Michigan documented how racial diversity enhances the intellectual and educational experiences of students. *See* Gary Orfield & Dean Whitla, *Diversity Challenged: Evidence on the Impact of Affirmative Action* 143-74 (2001). In the Orfield and Whitla study, 68 percent of Harvard students and 73 percent of Michigan students responded that racial diversity in the classroom enhanced their "think[ing] about problems and solutions in class." *Id.* at 156. Further, nearly two-thirds of all respondents to the Orfield and Whitla survey reported that diversity enhanced the quality of *most* of their law school classes. *See id.* at 160. Over half of the students surveyed at both schools responded that even racial controversies on campus yielded positive educational outcomes, because such events encouraged them to rethink their values. *See id.* at 162-63. Overall, 89 percent of Harvard students and 91 percent of Michigan students surveyed indicated that racial diversity in their student body represented a positive aspect of their educational experiences. *See id.* at 160. In sum, this study demonstrates empirically that a racially diverse student body enhances the training of future leaders of a multiracial society by preparing them to work together, to debate one another and even to disagree with each other respectfully.

Additional social science studies overwhelmingly support the conclusions reached in the Orfield and Whitla study and further establish that racial diversity in higher education provides distinct and measurable benefits to students. For example, William G. Bowen and Derek Bok, former presidents of Princeton University and Harvard University, respectively, have produced an exhaustive study of more than 45,000 students of all races who entered academically selective universities from 1976 to 1989. That study demonstrates, through a wealth of empirical evidence, that diversity in the classroom improves the quality of learning for *all* students. *See* Bowen & Bok, *supra*; *see also* David L. Chambers et al., *Michigan's Minority Graduates in Practice: The River Runs Through Law School,* 25 Law & Soc. Inquiry 395 (2000).

The integration of law school classrooms is especially critical because issues of race continue to be inextricably linked to so many aspects of the legal system and civil society. *See generally* Elizabeth A. Anderson, *Integration, Affirmative Action, and Strict Scrutiny*, 77 N.Y.U. L. Rev. 1195 (2002). Law school students and graduates are called upon to address enduring American dilemmas such as disparate administration of criminal justice, unequal access to health care and educational resources, and discrimination in employment. There can be no understanding of such issues without a nuanced appreciation of the persistent, though sometimes subtle, influence of race in American life.

2. Racial Diversity in Legal Education Helps to Dispel Pernicious Stereotyping

As Justice O'Connor has explained in the similar context of the influence of gender: "[I]n certain cases a person's gender and resulting life experience will be relevant to his or her view[s]" because "like race, gender matters." *JEB v. Alabama ex. rel. TB*, 511 U.S. 127, 148-49 (1994) (O'Connor, J., concurring). Although life experiences shaped by race affect the views and outlooks of minorities, the common influence of race has never produced a single, monolithic mindset within racial groups because individuals respond to life experiences in varying ways.

Race-conscious admissions policies further the broad, public mission of elite law schools by creating academic environments in which it is patently apparent that racial minorities possess a multitude of differing views, beliefs and experiences. Law schools that admit a racially diverse mix of students encourage, at least implicitly, academic and social interactions that expose the fallacy of racial stereotyping, forcing students to examine subconscious prejudices and to shed narrow-minded preconceptions. Detractors of race-conscious admissions policies often insinuate that such policies wrongly use race as a proxy for a particular viewpoint. *See, e.g.*, Brief for United States as *Amicus Curiae* at 20. To the contrary, such policies actually help to destroy the myth that individuals should be presumed to share common perspectives on any given subject simply because they belong to a certain racial group. The staggering intellectual diversity that exists within minority groups is in fact highlighted in racially diverse academic settings. *See* Harry T. Edwards, *Race and the Judiciary*, 20 Yale L. & Pol'y Rev. 325, 329 (2002)

(rejecting the suggestion that race can be viewed as a proxy for ideology and noting the broad range of ideological perspectives held by black legal scholars).

Properly understood, then, racial diversity in law school admissions is premised on an understanding made explicit by this Court: "If our society is to continue to progress as a multiracial democracy, it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury." *Edmonsville v. Leesville Concrete Co.*, 500 U.S. 614, 630-31 (1991). Racially mixed academic settings help to dispel the misconception that racial identity necessarily implies a uniform set of thoughts, attitudes and beliefs.

3. The Benefits of Racial Diversity Have Been Witnessed First-Hand by the Current Membership of the BLSAs

The current membership of the BLSAs has directly witnessed the ways in which a diverse academic environment creates a broader and richer understanding of the law, and can speak with conviction born from experience concerning the concrete advantages of racial diversity at their respective law schools. Race is relevant to at least three categories of legal questions. First, race is at the heart of many of this Court's most significant decisions, from *Dred Scott v. Sandford*, 60 U.S. 393 (1856), to *Brown v. Board of Education*, 347 U.S. 483 (1954). Second, race often lurks prominently in the subtext of a legal question even when it is not directly implicated in the dispositive issues. Analysis of capital punishment, for example, often proceeds in light of racial disparities in sentencing. Third, the issue of race often emerges unexpectedly, coloring consideration of legal issues that would appear on first

glance to be wholly self-contained. This Court's recent review of the constitutionality of school vouchers, for example, may have centered on First Amendment Establishment Clause concerns, but necessarily required a recognition of how racial minorities who reside in inner cities are affected by such programs. *See Zelman v. Simmons-Harris*, 122 S. Ct. 2460, 2480 (2002) (Thomas, J., concurring) (noting decision's impact on educational opportunities for underprivileged minority children).

Often, the BLSAs' members provide unique perspectives that dramatically transform the tenor of classroom discussions. Notably, Professors Orfield and Whitla found that law schools introduce many students to significant interracial contact for the first time. *See* Orfield & Whitla, *supra*, at 156 (noting that 50 percent of white Harvard and Michigan students surveyed reported "very little" to "no" interracial contact prior to attending law school; only six percent of black and two percent of Latino students had similar responses). However, black law students are not admitted to elite law schools simply to enhance the education of white law students by reminding them of the continuing effect of race on the lives of black Americans. Black law students themselves receive a better legal education when they are immersed in a diverse student body. That was the premise of this Court's holding in *Sweatt v. Painter*. Black students also benefit from the wide range of views held by students of all races and are prompted to reexamine their own preconceived notions. Further, learning in a racially mixed setting prepares the BLSAs' current members to enter the legal profession, where 50 years after *Sweatt* it continues to be true that "most of the lawyers, witnesses, jurors, judges and other

officials with whom [they] will inevitably be dealing" are likely to be white. *Sweatt*, 339 U.S. at 634.

B. Black Graduates Are Fulfilling the Public Mission of Elite Law Schools

It is axiomatic that racial diversity in legal education furthers the integration of the legal profession. Just as diversity in law school student bodies undoubtedly improves the nature and quality of learning, greater racial inclusiveness in the bar and on the bench provides dramatic benefits. Considered individually or together, these beneficial effects amount to a compelling governmental interest justifying race-conscious law school admissions policies. The advantages of greater diversity in the legal profession are considered here with an eye toward black graduates of elite law schools, and with respect to three particular areas of the profession: the judiciary, corporate law firms and public interest work.[7]

As discussed above, elite law schools such as Harvard, Michigan, Stanford and Yale have identified the preparation of students to assume leadership positions in America and to solve enduring social problems as core components of their missions. Because these schools provide exceptional

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[7] Elite law schools have also been chiefly responsible for integrating other areas of the profession, such as the legal academy. For example, in 2002, over 50 percent of black tenure-track faculty at the top 15 law schools as defined in Prof. Brian Leiter's "Educational Quality Rankings" were graduates of Harvard, Stanford or Yale. *See* Brian Leiter, *Where Tenure Track Professors Went to Law School, in New Educational Quality Rankings of U.S. Law Schools* (2002), *at* http://www.utexas.edu/faculty/bleiter/rankings/tenure.html; Association of American Law Schools, *The AALS Directory of Law Teachers* 1415-23 (2002).

legal training and other critical resources such as access to prestigious alumni, they have functioned – and will continue to function – as gateways to prominent positions within the legal profession. *See* Samuel Issacharoff, *Can Affirmative Action Be Defended?*, 59 Ohio St. L.J. 669, 684 (1998) (noting that elite public and private law schools "train a disproportionate share of the future political leadership of the state and nation"). Consider, for example, that each member of this Court holds a law degree from an elite law school: Harvard (4), Stanford (2), Columbia, Northwestern and Yale. The black graduates of elite law schools have leveraged the intellectual training and academic credentials they have received, along with relationships built with professors and alumni, to achieve remarkable success in the law, electoral politics and other venues that were until recently virtually closed to racial minorities in America. Moreover, these graduates have demonstrated a remarkable dedication to serving the public interest.

It is manifest, however, that the legal profession remains far from integrated. *See* Elizabeth Chambliss, *Miles to Go 2000: Progress of Minorities in the Legal Profession vi* (2002) ("Minorities in general continue to face significant obstacles to 'full and equal' participation in the profession * * * .") Further progress toward racial inclusiveness is threatened if the elite law schools do not continue to train significant numbers of racial minorities. If the legal profession regresses toward racial homogeneity, public confidence in the justice system will suffer. *See* Mark Hansen, *And Still Miles to Go*, 85 A.B.A. J. 68, 68 (1999) ("The makeup of the legal profession is one of the factors people look to in forming their perceptions of whether the justice system will treat them fairly * * * .").

1. The Judiciary

Although the bench is far from fully integrated,[8] even the limited strides toward inclusiveness to date have improved the judiciary's ability to grapple with difficult legal questions. *See* Edwards, *supra*, at 329 ("[R]acial diversity on the bench can enhance judicial decision making by broadening the variety of voices and perspectives in the deliberative process."); *see also* Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 Stan. L. Rev. 1217, 1217 (1992) ("Justice Marshall imparted not only his legal acumen but also his life experiences, constantly pushing and prodding [his colleagues] to respond not only to the persuasiveness of legal argument but also to the power of moral truth."). Recognizing that racial diversity on the bench improves the quality of judging does not require the acceptance of "some mythical black perspective," but rather the plain understanding that "life experiences have some bearing on how [judges] confront various problems." Edwards, *supra*, at 329.

Significantly, black graduates from elite law schools have helped to integrate the judiciary, including the Supreme Court. For example, eight out of the 17 black judges currently sitting on the federal circuit courts graduated from an elite law school. *See* Federal Judges Biographical Database, *at* http://air.fjc.gov/newweb/jnetweb.

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[8] *See, e.g.*, Ruth Bader Ginsburg, *Foreword*, 1997 Ann. Surv. Am. L. 1, 4 (1997) (introducing the report of the Second Circuit Task Force on Gender, Racial and Ethnic Fairness in the courts, and noting the Second Circuit's need to "remedy remaining shortfalls" with respect to appointments of women and minority judges).

nsf/fjc_bio. Of the 80 black federal district court judges currently sitting, over one-third attended an elite law school. *See id.* At least 30 black judges have graduated from Harvard alone. *See* Bowen & Bok, *supra*, at 284.

The presence of black judges on the bench promotes public confidence in the judicial system. Trust in that system's fairness is integral to the public's willingness to rely on the courts for resolution of civil disputes and oversight of criminal proceedings. *Cf.* Sandra Day O'Connor, *The Effects of Gender in the Federal Courts: The Final Report of the Ninth Circuit Gender Bias Task Force*, 67 S. Cal. L. Rev. 745, 760 (1994) ("When people perceive bias in a legal system, whether they suffer from it or not, they lose respect for that system, as well as for the law.").

The racial composition of the judiciary represents a significant factor in the public's estimation of whether judges will dispense justice fairly. *See* Sherrilyn A. Ifill, *Racial Diversity on The Bench: Beyond Role Models and Public Confidence*, 57 Wash. & Lee L. Rev. 405, 408-09 (2000) (explaining that a diverse bench promotes fairness in the judicial system). Further, numerous studies have demonstrated that a dearth of minority judges on the bench encourages the view that the judiciary is systemically biased against minority litigants and defendants. For instance, a 1999 study revealed a perception among many citizens, including 68 percent of blacks, that the judicial system treats blacks unfavorably as compared to whites. *See* David B. Rattman & Alan J. Tomkins, *Public Trust and Confidence in the Courts: What Public Opinion Surveys Mean to Judges*, Ct. Rev., 4 (1999). Notably, 43 percent of whites and 42 percent of Hispanics surveyed agreed that blacks are treated less favorably than whites in the courts. *See id.*

2. Corporate Law Firms

Corporate law firms provide representation in court and advice regarding business decisions for the world's largest and most influential business entities. The racial integration of corporate law firms helps demonstrate that after centuries of racial discrimination in the workplace, employment opportunities in the private sector are now being made available to individuals of all races. Further, a racially inclusive workforce is necessary for law firms and the corporations they counsel to respond creatively to the challenges of a multiracial society.

Graduates of elite law schools disproportionately fill positions in corporate law firms. Black lawyers who seek employment at these firms often find that a degree from an elite law school is a critical credential that is necessary to "counteract the lingering but nevertheless powerful effects of the pervasive myth of black intellectual inferiority." David B. Wilkins, *Rollin' On the River: Race, Elite Schools, and the Equality Paradox*, 25 Law & Soc. Inquiry 527, 533 (2000). A survey conducted by Professor Wilkins in 1995 indicated that in New York City and Washington, D.C. alone, "more than 50% of all black associates hired graduated from either Harvard or the top schools [Columbia, NYU, or Georgetown] in the local market," compared with a "corresponding number for whites [of] 40.4% in New York and 23.2% in Washington, D.C." *Id.* at 534. The numbers are even more striking for black partners. In 1993, 77 percent of black partners were elite law school

graduates,[9] and 47 percent were Harvard or Yale graduates. *See id.* at 534-35.

3. Public Service

Graduating lawyers "who will see the law as a call to service" is a fundamental component of the public missions of elite law schools. *Stanford Handbook*, *supra*, at 1. Black graduates and other minority alumni of these schools have fulfilled this goal by serving in public interest and legal services positions, committing significant resources to pro bono work and representing underserved communities – all at rates exceeding those of their white counterparts.

Minority lawyers – black lawyers in particular – have consistently been more likely than white lawyers to take jobs with public interest and governmental organizations, and to surpass their white colleagues in pro bono hours worked yearly. A recent study of black Harvard graduates found that nine percent of them took jobs with public interest or legal services organizations upon graduation. *See Harvard Black Alumni Report*, *supra*, at 34-35. This rate well exceeded the national average and was three times greater than the average for Harvard graduates generally. *See id.* A similar survey of Michigan alumni found that the percentage of minority lawyers employed in legal services or public interest jobs exceeded the number of white graduates similarly employed in each of the three decades covered in the survey. *See* Chambers, *supra*, at

[9] Professor Wilkins defined "elite law school" in a narrower sense than it is defined in this brief; his list of elite schools included only 11 institutions. *See* Wilkins, *Rollin' On the River*, *supra*, at 534 n.8.

427. Black law school graduates are also more likely than their non-black colleagues to assist traditionally underserved communities; for example, the Michigan survey found that black alumni were much more likely than white alumni to serve low- and middle-income clients. *See id.* at 435; *see also* Elizabeth Chambliss, *Organizational Determinants of Law Firm Integration*, 46 Am. U. L. Rev. 669, 731 (1997).

Finally, minority graduates of elite law schools have maintained a steadfast commitment to providing pro bono services. Black Harvard graduates average 90 hours per year of pro bono legal representation. *See Harvard Black Alumni Report*, *supra*, at 47. Similarly, minority Michigan alumni in private practice average 75 hours of pro bono representation, compared to 51 hours for white Michigan alumni, *see* Chambers, *supra*, at 456, and about 24 hours on average across the country, *see* Deborah L. Rhode, *The Constitution of Equal Citizenship for a Good Society: Access to Justice*, 69 Fordham L. Rev. 1785, 1810 (2001).

4. Progress Toward Full Integration of the Legal Profession Must Continue

Despite the incipient racial progress in the legal profession, the lack of true diversity remains appalling. For example, although blacks and Latinos make up 25 percent of the country,[10] combined black and Latino representation among lawyers was only 7 percent in 1998. *See* Chambliss, *Miles to Go 2000*, *supra*, at *v*. Further, minority

[10] *See* United States Census Bureau, *Census 2000*, *at* http://www.census.gov/population/cen2000/phc-t1/tab01.pdf.

representation is particularly lacking in senior legal positions throughout the profession. *See id.* at *vi* (concluding that "[m]inority representation in upper-level jobs remains miniscule, especially in the for-profit sector."). For example, "[m]inorities make up less than 3% of the partners in the nation's 250 largest law firms." Wilkins, *Rollin' On the River*, *supra*, at 539.

It is imperative that elite law schools continue to train and graduate significant numbers of minority attorneys. When these graduates serve as judges, they signal to the public that the justice system is unbiased and impartial, and that the courts value racial inclusiveness. When these graduates reach prominent positions in private practice or public institutions, they demonstrate that persistent barriers to equal opportunity are continuing to crumble. The legal profession's tentative steps toward integration cannot grow into significant strides if elite law schools no longer take race into account in admissions decisions.

II. ALTERNATIVE RACE-NEUTRAL ADMISSIONS POLICIES CRITICALLY DIMINISH THE NUMBER OF BLACK STUDENTS AT ELITE LAW SCHOOLS AND ARE NOT EFFECTIVE SUBSTITUTES FOR CURRENT RACE-CONSCIOUS ADMISSIONS POLICIES

As discussed above, elite law schools fulfill their public missions by providing racially diverse academic environments and training attorneys to improve the legal profession and serve the public. These law schools cannot continue to realize their missions if they are not able to consider race as one factor in admissions decisions. The

leading approaches that have been touted as viable race-neutral alternatives to current law school admissions policies that take race into account are not in fact effective, workable or desirable with respect to elite law schools. Abandoning race-conscious admissions at elite law schools would lead to a catastrophic reversal of the incremental progress toward greater racial inclusiveness that these schools have made. For black students, a shift to a color-blind or race-neutral admissions system would lead to admissions results that are tantamount to "the inexorable zero." *Cf. Johnson v. Transp. Agency*, 480 U.S. 616, 656-57 (1987) (O'Connor, J., concurring) (quoting *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 342 n.23 (1977)) (discussing prima facie evidence of discrimination under Title VII). The race-neutral alternatives discussed below are demonstrably inferior to race-conscious policies in achieving racial diversity because they cannot ensure that black students will be represented in meaningful numbers at most, if not all, of the elite law schools. Consequently, such alternatives would also exclude black students from access to gateways to some of the most prestigious positions in the legal profession. Accordingly, the benefits gained from employing race-conscious admissions policies are distinct from, and greater than, those provided by race-neutral alternatives.[11]

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[11] Moreover, even if an effective race-neutral alternative could be implemented, the mere availability of such an alternative would not provide a justification for forgoing the use of race-conscious measures. In fact, race-neutral alternatives cannot fairly be characterized as more narrowly tailored than carefully crafted race-conscious policies. If race-neutral alternatives are as effective as the policies they replace, then these race-neutral policies "trammel" the expectations of third parties

(Continued on following page)

A. "Percentage Plans" Are Not Viable Alternatives to Race-Conscious Admissions Policies

So-called "percentage plans" were created in the late 1990s for use in undergraduate admission programs at state universities. *See* Catherine L. Horn & Stella M. Flores, *Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences* 19-23 (2003) (discussing race-neutral percentage admissions plans used in college admissions in California, Texas and Florida). These plans grant automatic admission to state universities to students graduating within a certain top percentage of their public high school classes. *See id.* Critics of race-conscious admissions policies have touted these plans as effective alternatives, even in the graduate admissions context. *See, e.g.*, Brief for United States as *Amicus Curiae* at 13-18; Brief for the State of Florida as *Amicus Curiae* at 8-10. However, at least two significant impediments prevent percentage plans from assuring meaningful racial inclusiveness in the student bodies of elite law schools. *See* Horn & Flores, *supra*, at 41-51, 58-59 (relying on data from state agencies, the federal National Center for Education Statistics, the U.S. Census, institutional and

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to the same extent as do race-conscious policies. *Cf. Johnson v. Transp. Agency*, 480 U.S. 616, 626 (1987) (approving the use of gender in an affirmative action plan in the workplace because it did not unnecessarily trammel the rights of other employees or create an absolute bar to their advancement). But if the race-neutral alternatives are not as effective as race-conscious policies, then those plans are not more narrowly tailored because they fail to achieve the compelling interest in maintaining meaningful minority enrollment. Either way, the existence of race-neutral alternatives does not provide a justification for forgoing the use of race-conscious measures.

state documents, and interviews to conclude that the race-neutral percentage admissions plans used in California, Texas and Florida are inadequate alternatives to race-conscious admissions plans).

First, percentage plans were designed specifically for college admissions. They are functionally incompatible with graduate school admissions, which must necessarily take into account demonstrated interest and experience in applicable fields of study, not simply generalized academic achievement. Second, even assuming *arguendo* that percentage plans could somehow work in the graduate school context, such plans certainly would not be effective with respect to admissions to elite law schools. Percentage plans rely on admission of a fixed portion of students at a limited number of pre-determined "feeder" schools. *See, e.g.*, Danielle Holley & Delia Spencer, *The Texas Ten Percent Plan*, 34 Harv. C.R.-C.L. L. Rev. 245, 277 (2000) (considering the recruiting policies of Texas state universities and noting the limited number of schools from which the universities have admitted students under the plan). In contrast, elite law schools recruit applicants from hundreds of colleges over a large geographical area, and the number of undergraduate applicants vastly exceeds the number of students that are accepted by these schools. *See* Jack Greenberg, *Affirmative Action in Higher Education: Confronting the Condition and Theory*, 43 B.C. L. Rev. 521, 540 (2002) (explaining the practical ineffectiveness of percentage plans).

Even if elite law schools were able to overcome such overwhelming implementation problems, it is unclear how percentage plans would work to maintain current levels of racial diversity at those schools for an additional reason. Percentage plans' ability to bring meaningful numbers of

minority high school graduates to competitive universities has, perversely, depended on the existence of segregated secondary school systems. *See* Marta Tienda, *College Admissions Policies and the Education Pipeline: Implications for Medical and Health Professions, in The Right Thing To Do, the Smart Thing To Do: Enhancing Diversity in Health Professions* 117, 129 (Brian D. Smedley et al. eds., 2001). Undergraduate institutions whose student bodies are composed primarily of black or minority students do not exist in sufficient numbers to enable such a policy to maintain current levels of minority representation at competitive law schools.

B. Admissions Policies That Focus on Socio-Economic Disadvantage Are Not Effective Alternatives to Race-Conscious Admissions Policies

Other critics have suggested that consideration of socio-economic status should replace that of race in the admissions calculus. *See, e.g.*, Richard D. Kahlenberg, *The Remedy: Class, Race, and Affirmative Action* (1996); William J. Wilson, *The Truly Disadvantaged* (1987); Richard H. Fallon, Jr., *Affirmative Action Based on Economic Disadvantage*, 43 U.C.L.A. L. Rev. 1913 (1996). An enhanced focus on socio-economic status, however, would not represent an effective substitute for elite law schools' current race-conscious admissions policies for at least two reasons. First, although blacks are disproportionately poor, whites drastically outnumber blacks at the lowest income levels, and are more likely than blacks to possess the test scores that qualify them for admission to academically selective institutions of higher education. *See* Bowen & Bok, *supra,* at 51; Wightman, *supra*, at 39-45; *see*

also Jerome Karabel, *No Alternative: The Effects of Color-blind Admissions in California, in Chilling Admissions: The Affirmative Action Crisis and the Search for Alternatives* 33, 37-38 (1998) (explaining that consideration of applicants' socio-economic status would produce minimal racial diversity).

Second, admissions policies that look to socio-economic class place greater emphasis on income than wealth because income is a more readily quantifiable metric. *See* Deborah C. Malamud, *Class-Based Affirmative Action: Lessons and Caveats*, 74 Tex. L. Rev. 1847, 1850 (1996) (cautioning that the economic status of traditionally disadvantaged groups, such as blacks, is likely to be overstated under mainstream common approaches to economic inequality). Notably, however, the disparity in wealth between blacks and whites is even more pronounced than the income gap. On average, although black workers earn 60 percent of what their white counterparts earn, black workers' net worth is just nine percent of white workers' net worth. *See* Kelvin M. Pollard & William P. O'Hare, *America's Racial and Ethnic Minorities, in Population Bulletin*, Sept. 1999, at tbl. 6, *available at* http://www.prb.org/Content/NavigationMenu/PRB/AboutPRB/Population_Bulletin2/Americas_Racial_and_Ethnic_Minorities.htm (estimating that the median black family possesses a net worth of $4,400 as compared with $45,700 for the median white family); *see also* Bowen & Bok, *supra*, at 48. Accordingly, because socio-economic status considerations are conducted in a way that fails to focus on economic disparities that are particular to blacks, such a race-neutral alternative does not appear to rival the consideration of race. Although socio-economic status may be a valid consideration in the law school admissions context,

concentrating on that factor without taking into account race as well is unlikely to produce a student body that is racially diverse. *See, e.g.*, Thomas J. Kane, *Misconceptions in the Debate Over Affirmative Action in College Admissions, in Chilling Admissions: The Affirmative Action Crisis and the Search for Alternatives* 24 (1998) (arguing that socio-economic status is a poor substitute for race in selective admissions programs).

C. Elite Law Schools That Have Abandoned Race-Conscious Admissions Policies Have Not Been Able To Maintain Meaningful Racial Diversity

The experience of law schools that have stopped relying on race-conscious admissions policies strongly suggests that meaningful levels of minority admissions or enrollment at elite law schools cannot be maintained in the absence of such policies. For example, in the wake of California's Proposition 209, which in 1996 barred the consideration of race in state university admissions decisions, the number of black students admitted to University of California ("UC") law schools has significantly decreased. *See* United States Commission on Civil Rights, *Beyond Percentage Plans: The Challenge of Equal Opportunity in Higher Education* (2002), *at* http://www.usccr.gov/pubs/percent2/ch2.htm (hereinafter *Challenge*). In 1996-1997, the last admissions cycle before Proposition 209 was implemented, 7.2 percent of admitted students at all UC law schools were black. *See id.* In the three subsequent years, blacks were admitted at an average rate of less than 3 percent. *See id.* A similar decline in black representation has occurred at the University of Texas Law School in the wake of the Fifth Circuit's decision in *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), *cert. denied*,

518 U.S. 1033 (1996), despite that law school's consideration of socio-economic factors in the admissions process. *See Challenge, supra* (noting that after restrictions on race-conscious admissions decisions were imposed pursuant to *Hopwood* in 1997-1998, black enrollment fell from 6.4 percent to 4.7 percent, and that by 2000-2001, black enrollment had fallen to 2.3 percent of the class).

Finally, Petitioner, like many critics of race-conscious law school admissions policies, envisions an admissions program with an increased emphasis on GPAs and LSAT scores. *See* Brief for Petitioner at 39-40. Whether these metrics measure objective merit and whether they should constitute the primary considerations for admissions officers is certainly questionable.[12] The BLSAs note that a trend towards increased reliance on GPAs and LSAT scores for admissions decisions would have a far greater impact on black representation in legal education than a mere reallocation of black students among law schools. That is, were law school admissions to be based on GPAs and LSAT scores alone, substantial numbers of black students would not have access to a legal education, and

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[12] *See, e.g.*, William C. Kidder, *Does the LSAT Mirror or Magnify Racial and Ethnic Differences in Educational Attainment?: A Study of Equally Achieving "Elite" College Students*, 89 Cal. L. Rev. 1055 (2001) (arguing that the LSAT unintentionally discriminates against black law school applicants and under-measures their actual ability); Anthony Peirson Xavier Bothwell, *The Law School Admission Test Scandal: Problems of Bias and Conflicts of Interest*, 27 Thur. Mar. L. Rev. 1 (2001) (concluding that the LSAT does not correlate well to performance in law school or law practice); *see also* Lani Guinier & Susan Sturm, *Rethinking the Process of Classification and Evaluation: The Future of Affirmative Action: Reclaiming The Innovative Ideal*, 84 Cal. L. Rev. 953 (1996) (arguing that conventional numbers-only admissions policies prevent law schools and universities from fulfilling their missions).

only a handful would have access to a legal education at the elite law schools.

Professor Linda Wightman has analyzed how minority admission rates would be affected if law schools relied exclusively on GPAs and LSAT scores, or "numbers-only" admission criteria. *See* Linda F. Wightman, *The Consequences of Race-Blindness: Revisiting Prediction Models With Current Law School Data*, forthcoming in 53 J. Legal Educ. (2003); Wightman, *The Threat to Diversity*, *supra* at 22 tbl.5. Such an admissions regime would greatly reduce the number of black students admitted to any law school. In 2000-2001, approximately 50 percent of black law school applicants were admitted to at least one law school. *See* Wightman, *The Consequences of Race-Blindness*, *supra*, at 11. If an admissions process relying strictly on GPAs and LSATs were instituted, this figure would not have been higher than 43 percent and might have fallen as low as 31 percent. *See id.*

The reduction in the number of black students admitted to the most competitive law schools would be even more devastating. Prof. Wightman's research reveals that at the most selective schools, the percentage of black admitted applicants would plunge from 6.7 percent to 1.2 percent of admitted students. *See id.* at 18. Such a result would, in effect, return racial diversity in legal education to a level unseen since the era prior to the civil rights movement, when "barely 1 percent of all law students in America were black * * * and virtually no black students were enrolled in [any] * * * predominantly white law school." Bowen and Bok, *supra*, at 5. Not only would such a trend toward racial homogeneity prevent elite law schools from fulfilling their public missions and deprive the legal profession of leadership that is responsive to the needs of an increasingly multiracial society, but the

number of black law students at elite law schools under the numbers-only admission model would approach "the inexorable zero."

CONCLUSION

The Sixth Circuit opinion upholding the use of race-conscious admissions policies at the University of Michigan Law School should be affirmed.

Respectfully submitted,

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